STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v NAN LU, Defendant-Appellant.	UNPUBLISHED February 7, 2012 No. 300854 Oakland Circuit Court LC No. 2009-227194-FH

Before: SHAPIRO, P.J., and WHITBECK and GLEICHER, JJ.

WHITBECK, J. (*concurring*).

For many of the same reasons that I set out in my dissent in *People v Ruimveld*,[1] I concur. Under circumstances where the jury saw, *during their deliberations as to guilt or innocence*, video images of deputies shackling defendant Nan Lu and leading him from the courtroom, there is no question in my mind that these images were prejudicial to Lu, and conclusively so.

There is no indication that I can find as to why it was necessary to shackle Lu in the first place. We know that shackling constitutes an "extreme measure" that should be used only under extreme circumstances[2] and that these extreme circumstances are limited to the need "to prevent escape, injury to persons in the courtroom, or to maintain order."[3] There is no showing here that any of these circumstances were present.

But, as my colleagues note, a brief or inadvertent glimpse of a defendant in shackles is not inherently or presumptively prejudicial to a defendant. Stated another way, if a jury

[1] *People v Ruimveld*, unpublished opinion per curiam of the Court of Appeals, issued July 13, 2001 (Docket No. 227793).

[2] See *People v Dunn*, 446 Mich 409, 425, n 26; 521 NW2d 255 (1994); see also *Holbrook v Flynn*, 475 US 560, 568; 106 S Ct 1340; 89 L Ed 2d 525 (1986).

[3] *Dunn*, 446 Mich 425.

inadvertently sees a shackled defendant, there must be some showing that prejudice resulted.[4] Here, the trial court's explanation of its discussions with the jury, after the jury reached its guilty verdict, certainly indicates that the video images of Lu in shackles that the jury saw were brief and inadvertent. With ringing certitude, the prosecution asserts that this is enough. It states in its brief that, "Since defendant has not demonstrated the requisite prejudice, this Court simply cannot find that the trial court's decision to deny defendant's motion for a new trial/mistrial was outside the range of reasonable and principled outcomes."

But this is most certainly not enough. The prosecution simply chooses to ignore the fact that the "brief and inadvertent" showing of the video images of Lu in shackles occurred, as my colleagues note, at the most critical stage of the trial: during the deliberations that led to a guilty verdict. Combined with the fact that there was no showing of any need for any such shackling, this is, as I put it in *Ruimveld*, the very essence of prejudice. In every American courtroom a criminal defendant has the absolute right to the presumption of innocence. This is, and must be, particularly true in the jury room where no records are kept, no arguments—except between and among the jurors—are heard, no procedural or substantive rules—except those contained in the trial court's instructions—govern, and where a single fleeting glance of a defendant in chains may be enough to convince just one wavering juror to change that juror's vote from not guilty to guilty.

And, as my colleagues note, no retroactive curative instruction could repair this most basic jurisprudential defect. There could be no absolute presumption of innocence in the jury room while the jury pondered Lu's fate. The video images that the jury saw of Lu in shackles banished that absolute presumption irrevocably. When the showing of the video was complete and with the presumption of innocence gone, the jury could only be left with prejudice.

In my view, such circumstances—where Lu was seen by the jury during its deliberations, as my colleagues very aptly describe it, "clothed in the garb of guilt"—are presumptively prejudicial. Consequently, the trial court's denial of the motion for new trial was outside the range of reasonable and principled outcomes, and we should reverse on that ground alone. Having reached that conclusion, I believe we need not reach the question of whether the trial court violated Lu's Sixth Amendment right to be present during all critical stages of his trial, and I do not join in my colleagues' analysis and conclusion on this question.

/s/ William C. Whitbeck

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[4] *People v Moore*, 164 Mich App 378, 385; 417 NW2d 508 (1987).